

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Joint Application by SBC Communications, Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 01-194
Southwestern Bell Communications Services, Inc.	)	
d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Arkansas and Missouri	)	

**REPLY COMMENTS OF  
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) submits these Reply Comments concerning the Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company (“SWBT”), and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (collectively “SBC”) for Provision of In-Region, InterLATA Services in Arkansas and Missouri (“Joint Application”).<sup>1</sup> For the reasons stated herein, and in McLeodUSA’s previously filed Comments,<sup>2</sup> the Joint Application should be denied. McLeodUSA concurs with the Comments submitted by the United States Department of Justice (“DoJ”), the Missouri Office of Public Counsel, AT&T, WorldCom, Inc., Sprint Communications, NuVox, Inc., and El Paso Networks, LLC et al., all of which provide detailed and ample evidence that SWBT’s Application should be denied.<sup>3</sup>

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<sup>1</sup> Comments Requested on the Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Arkansas and Missouri, Public Notice, CC Docket No. 01-194, DA 01-1952, released August 20, 2001.

<sup>2</sup> CC Docket No. 01-194, Comments of McLeodUSA Telecommunications Services, Inc. (September 10, 2001) (“*McLeodUSA Comments*”).

<sup>3</sup> CC Docket No. 01-194, Evaluation of the United States Department of Justice (September 24, 2001) (“*DoJ Evaluation*”); Comments of the Missouri Office of the Public Counsel (September 10,

## I. INTRODUCTION AND SUMMARY

SBC's Joint Application is a farce. It is a farce that seeks to make a mockery of Section 271 of the Telecom Act. SBC has not opened its Missouri and Arkansas markets to competition. Quite to the contrary, SBC has deliberately thwarted competition in these markets for years. Furthermore the competitive environment is worsening. As Sprint notes:

The 1996 Telecommunications Act's policy of stimulating local competitive entry is threatening to fail. Industry participants have been forced to slow or reverse course. Facilities-based competitive entrants are experiencing financial difficulties on a widespread basis. Both large and small CLECs have been unable to raise additional capital needed to expand. Some have gone bankrupt; others have merely retreated from earlier business plans. In this context, SBC's portrayal of widespread competition in the states of Arkansas and Missouri is simply surreal.<sup>4</sup>

Similar information is echoed by the Missouri Office of Public Counsel in discussing the evidence presented in Case No. TO-2001-467<sup>5</sup> pending before the Missouri Public Service Commission ("MPSC"):

According to the testimony filed to date, the outlook for real and effective competition in the local market is not good. This evidence strongly suggests that there is and absence of effective competition in the local exchanges of SWBT in the state.<sup>6</sup>

SBC's original Missouri 271 Application filed in CC Docket Number 01-88 was grossly deficient and was rejected by this Commission largely due to problems with

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2001)(*"Office of Public Counsel Comments"*); Comments of AT&T Corp. In Opposition to SBC Communications, Inc.'s Section 271 Application for Missouri (September 10, 2001)(*"AT&T Comments"*); Comments of WorldCom, Inc. on the Application by SBC Communications, Inc. for Authorization to Provide In-Region, InterLATA Services in Missouri (September 10, 2001)(*"WorldCom Comments"*); Comments of Sprint Communications Company L.P. (September 10, 2001) (*"Sprint Comments"*) Comments of NuVox, Inc. (September 10, 2001)(*"NuVox Comments"*); and Comments of El Paso Networks, LLC et al. (September 10, 2001).

<sup>4</sup> Sprint Comments at 2.

<sup>5</sup> In this proceeding entitled *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, SWBT is seeking competitive status for all of its services in all Missouri exchanges. If successful SWBT will receive total flexibility to increase or decrease consumer prices as it sees fit.

SBC's pricing for Unbundled Network Elements ("UNEs") and with SBC's Operational Support Systems ("OSS"). SBC's Joint Application fails to cure any of the deficiencies cited by this Commission in its rejection of SBC's original Application, and otherwise falls grossly short of meeting the requirements set forth in section 271 of the Telecom Act.

In order for it to approve SBC's Joint Application, this Commission would have to misapply or ignore substantial portions of the Telecom Act and the Commission's own orders. Specifically, in order to approve of SBC's Joint Application, this Commission would have to: (a) misapply or ignore numerous competitive checklist item requirements contained in section 271 (c)(2)(B); of the Telecom Act; (b) completely ignore the public interest requirements of section 271(d)(3)(C) of the Telecom Act; (c) misapply or ignore the track A requirements contained in section 271(c)(1)(A) of the Telecom Act; (d) misapply or ignore the "is currently providing" standard contained in section 271(c)(2)(A)(i)(I) of the Telecom Act; (e) misapply or ignore the "fully implemented" requirement of section 271(d)(3)(A) of the Telecom Act; (f) completely ignore the requirement set forth in numerous previous FCC orders that an RBOCs markets must be "irreversibly open to competition;"<sup>7</sup> and (g) completely ignore previous FCC orders limiting the use of interim rates as a basis for section 271 approval.<sup>8</sup> Thus, SBC has set quite a hoop for this Commission to jump through in order to approve its Joint

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<sup>6</sup> Office of Public Counsel Comments at 8.

<sup>7</sup>Memorandum Opinion and Order, *In re: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act of 1934, as Amended , to Provide In-Region, InterLATA Services in the State of New York*, 15 FCC Rcd 75 (Dec. 22, 1999)(*"FCC New York Order"*) par.423; Memorandum Opinion and Order, *In re: Application of SBC Communications Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Texas*, 15 FCC Rcd 18,354 (June 30, 2000)(*"FCC Texas Order"*) par.417;

<sup>8</sup> FCC New York Order, par. 260.

Application. The Commission should not take such a leap. Besides requiring the Commission to override a large body of federal law, an approval of SBC's joint application would ratify SBC's improper and illegal practice of deliberately thwarting competition until the eve of its 271 application, and then attempting to wipe out years of anti-competitive conduct with an unproven newly slapped together interconnection agreement.

The record presented in this case clearly indicates that SBC has thwarted competition in Arkansas and Missouri. SBC's pricing for UNEs has been historically and improperly excessive and still does not comply with section 271 requirements.<sup>9</sup> SBC has historically provisioned collocation in an anti-competitive manner imposing onerous prices, terms, and conditions on an Individual Case Basis ("ICB").<sup>10</sup> SBC inhibits competition with respect to advanced services by refusing to resell its DSL service to CLECs, by denying CLECs access to its Project Pronto network and by restricting the ability of CLECs to engage in line sharing and line splitting.<sup>11</sup> SBC also thwarted competition by failing to make its local plus intraLATA wide calling plan available for resale to CLECs and IXEs.<sup>12</sup> Finally, as if all the above were not enough, SBC dealt the coup de grâce to CLECs by refusing to recognize CLECs as participants in the Missouri Metropolitan Calling Area Plan ("MCA"), thereby blocking facilities based competition in the Missouri metropolitan markets of Kansas City, Springfield and St. Louis for nearly two years.<sup>13</sup> The results of SBC's anti-competitive conduct have been fruitful. THERE

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<sup>9</sup> McLeodUSA Comments at 6-11.

<sup>10</sup> Id. at 13-15.

<sup>11</sup> AT&T Comments at 60-76; WorldCom Comments at 2-12.

<sup>12</sup> Office of Public Counsel Comments at 8.

<sup>13</sup> McLeodUSA Comments at 23; CC Docket 01-88 Comments of McLeodUSA at 3-13 (April 24, 2001); Office of Public Counsel Comments at 7-8; AT&T Comments at 102-03; CC Docket No. 01-88, Evaluation of the United State Department of Justice at 13 (May 9, 2001) ("*DoJ MO Evaluation*")

IS NO MEANINGFUL COMPETITION IN ARKANSAS AND MISSOURI. The evidence presented demonstrates that CLEC market shares in Arkansas and Missouri are anemic, especially with respect to facilities based service.<sup>14</sup> The evidence presented also demonstrates that SBC's anti-competitive conduct is a major cause of these anemic numbers.<sup>15</sup>

## **II. SBC HAS FAILED TO CORRECT THE FLAWS IN ITS UNE PRICING FATAL TO ITS PREVIOUS APPLICATION**

The evidence presented in this case overwhelmingly demonstrates that SBC's pricing of UNEs fails to comply with item 2 of the competitive checklist set forth in section 271 of the Telecom Act.<sup>16</sup> SBC's rates for a UNE loop in Missouri are higher than any other state in the SWBT region, even though SBC's costs are lower in Missouri than in every other state in that region except Texas.<sup>17</sup> The vast price disparities between the UNE rates charged by SBC in Missouri compared with other region states are well documented in the evidence presented to the Commission.<sup>18</sup> Likewise, SBC's failure to establish cost based UNE rates in accordance with TELRIC principles, accompanied by Missouri Public Service Commission's ("MPSC") failure to establish many permanent UNE rates in Missouri, is also well documented by the evidence presented in this proceeding.<sup>19</sup>

SBC's recent "voluntary" reduction of certain Missouri UNE rates does not correct the deficiencies in its application with respect to checklist item number 2. Not

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<sup>14</sup> Office of Public Counsel Comments at 8-9.

<sup>15</sup> AT&T Comments at 97; DoJ MO Evaluation at 6, 19; Sprint Comments at 17.

<sup>16</sup> McLeodUSA Comments at 6-13; NuVox Comments at 2-15; WorldCom Comments at 18-27; Sprint Comments at 18-26; AT&T Comments at 9-44.

<sup>17</sup> WorldCom Comments at 19. See also, DoJ MO Evaluation at 13.

<sup>18</sup> NuVox Comments at 4-6.

only are the various rates which SBC reduced still inexplicably higher than the rates offered everywhere else in the region but, as the DoJ has noted, “SBC’s selective rate reductions, however, do not address the Department’s earlier concerns about the large number of interim rates in Missouri.”<sup>20</sup>

The FCC is unable, as a matter of law to conclude that SBC has satisfied the requirement of Checklist Item 2, given the incomplete factual record concerning Missouri UNE rates. In its Missouri evaluation, the DoJ raised numerous significant concerns with the rates developed by the MPSC in the Missouri arbitration cases of TO-97-40 and TO-98-115.<sup>21</sup> The DoJ noted the excessiveness of the rates, and indicated that the cost differences between other states did not explain such a great disparity.<sup>22</sup> Quite significantly, the DoJ indicated that the record in those Missouri arbitration cases did not reflect that the MPSC had properly implied TELRIC methodology in setting rates.<sup>23</sup> SBC failed, however, to adequately address the DoJ’s concerns. As NuVox indicates:

SBC had a golden opportunity to rectify the extreme price disparities when, after having withdrawn its initial Missouri application earlier this year, it came before the MPSC and sought and received approval to modify the M2A to implement price reductions for limited set of UNEs. However, in making those recent price adjustments, SBC chose not to touch the rates for any of the TO-98-115 UNEs,...<sup>24</sup>

Speaking of missing golden opportunities to rectify things, the MPSC refused to hold any further evidentiary hearings after SBC’s withdrew its original Application in CC Docket No. 01-88. As a result, SBC’s Joint Application has been filed with this

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<sup>19</sup> McLeodUSA comments at 6-11; AT&T Comments at 16-39; WorldCom Comments at 24-27; NuVox Comments at 3-14.

<sup>20</sup> DoJ Evaluation at 8.

<sup>21</sup> DoJ MO Evaluation at 10-20.

<sup>22</sup> Id. at 12-14.

<sup>23</sup> Id. at 14-19.

<sup>24</sup> NuVox comments at 10-11.

Commission without the creation of any supplemental record whatsoever at the MPSC concerning any additional evidence submitted by other parties, and most importantly concerning any of the newly reduced UNE rates. The evidence presented in this proceeding clearly demonstrates that these newly reduced UNE prices did not even bring Missouri UNE prices in line with the rates approved in other SWBT region states. Apparently, SBC wants everyone, including this Commission to take it for granted that its UNE prices are TELRIC compliant and compliant with competitive checklist item 2. This Commission, with all due respect, is simply not in any position to make any such determination. As noted by the Missouri Office of Public Counsel:

The revised M2A price structure is a new fact in the application. Another new set of facts are the prices offered by SWBT in Arkansas in the A2A which then was incorporated into a companion application at the FCC on August 20<sup>th</sup>. (TR 3411). It is apparent that the leakage of TELRIC costs to SWBT's wholesale prices has been abandoned as an operative factual consideration by SWBT.<sup>25</sup>

There are two avenues available that comply with Section 252 of the Telecom Act.<sup>26</sup> Either the FCC can determine that prices are TELRIC based and in accordance with the requirements of checklist item 2 by relying on the factual record submitted by the MPSC, or the FCC can make its own independent determination of the UNE prices at issue. Since the MPSC has conducted no evaluation and, thus, created no factual record with respect to the new UNE rates submitted by SBC, and since the FCC has not yet conducted its own independent TELRIC analysis of these rates, as a matter of law the FCC cannot hold that SBC's new rates are sufficient to satisfy the requirements of checklist item number 2.

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<sup>25</sup> Comments of Office of Public Counsel at 6-7.

<sup>26</sup> See McLeodUSA Comments at 7-8.

SBC presented no evidence to the MPSC, and has presented no evidence to this Commission, that its new rates are presently the appropriate rates for Missouri. As MPSC Commissioner Gaw noted:

This Commission [the MPSC] has heard no evidence as to the appropriateness of these rates of the date of this order. It can only say that the rates are lower and thus deductibly better for competition than the rates approved in a previous case.<sup>27</sup>

### **III. SBC HAS FAILED TO CORRECT THE FLAWS IN ITS OSS FATAL TO ITS PREVIOUS APPLICATION**

Significant problems have been identified in SBC's LMOS database system, which is used to input and track SBC's trouble ticket performance. Most disturbing about this situation is the fact that SBC appears to have misled the MPSC Commission as to the accuracy of its LMOS, and as to whether it corrected problems with that system. Clearly SBC filed affidavits with this Commission in CC Docket No. 01-88 that misrepresented the accuracy, or lack thereof, of its LMOS, and that misrepresented its efforts, or lack thereof, to correct its LMOS.

The problems with SBC's LMOS system have significantly impacted CLECs in a number of ways. SBC's problems with updating its LMOS system denies CLECs equal access to maintenance and repair functions enjoyed by SBC in its own retail operations.<sup>28</sup> As a result CLECs are not able to resolve maintenance and repair problems for their own customers with the same degree of timeliness and accuracy as SBC is able to do same for its own customers.<sup>29</sup> Additionally, since the LMOS system is used to pull SBC's trouble ticket performance measures, the LMOS updating problem has significantly affected the

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<sup>27</sup> MPSC Case No. TO-99-227, MPSC order dated August 30, 2001, Gaw, concurring opinion p.1.

<sup>28</sup> AT&T Comments at 79.

<sup>29</sup> Id. at 79-80.



accuracy of the performance data provided by SBC to this Commission regarding its 271 application.<sup>30</sup> As a result of SBC's LMOS updating problems, numerous trouble ticket reports submitted by CLECs have either been improperly recorded or not recorded at all.<sup>31</sup>

The DoJ has noted the importance of the availability of adequate LMOS records and has concluded that the problems with SBC's LMOS have yet to be adequately resolved.<sup>32</sup> Indeed the current evidence indicates that new errors in SBC's LMOS are arising at an increasing rate.<sup>33</sup>

In addition to SBC's misrepresentations concerning the accuracy of its LMOS system, SBC has also admittedly filed false affidavits in conjunction with its Kansas and Oklahoma 271 application regarding the availability of DSL capable loops.<sup>34</sup> Despite the misrepresentations made by SBC to the Oklahoma Corporation Commission, to the MPSC and to this Commission regarding SBC's OSS, SBC amazingly asks the Commission to rely on its self-certified assurances concerning the purported readiness of its OSS. As WorldCom notes, "[i]t is therefore astonishing that SBC would file yet another application resting on self-certification and attestations by Ernst & Young. The Commission should not even consider granting this application absent and independent, third-party test of SBC's OSS."<sup>35</sup>

## **VI. SBC FAILS TO MEET THE TRACK A REQUIREMENTS IN ARKANSAS**

As noted by Sprint, there are no facilities-based carriers offering an actual commercial alternative to SWBT for residential customers. Congress has mandated that

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<sup>30</sup> Id. at 80-81.

<sup>31</sup> Id.

<sup>32</sup> DoJ Evaluation at 11-12.

<sup>33</sup> Id. at 10.

“there must be an actual commercial alternative to the BOC in order to satisfy section 271 (c)(1)(A).”<sup>36</sup> Additionally, the FCC has indicated that:

There may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a “competing provider.”<sup>37</sup>

The evidence presented in this proceeding clearly indicates that there are no facilities based carriers offering an “actual commercial alternative” to SWBT for residential customers in Arkansas.<sup>38</sup> SBC attempts to argue that the requirements of Track A can be met even if there are no facilities based competitors available to them as long as there is an available competitor providing resale services. SBC is wrong. Resale competition alone does not satisfy the requirement of Track A. The requirement of facilities based competition contained in section 271 (c)(1)(A) applies independently to both business and residential customers as a matter of law.<sup>39</sup>

Respectfully Submitted,

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<sup>34</sup> Letter to Magalie Roman Salas, FCC, from SBC, CC Docket No.00-217 (April 13, 2001).

<sup>35</sup> WorldCom Comments at 13.

<sup>36</sup> FCC Oklahoma Memorandum Opinion Order, *in re: Application by SBC Communications pursuant to Section 271 of the Communications Act of 1934, as amended, to provide in-region, interLATA services in Oklahoma*, 12 FCC Rcd 865 par.14 (“Oklahoma Order”).

<sup>37</sup> FCC Michigan Memorandum Opinion and Order, *in re: Application of Ameritech Michigan pursuant to Section 271 of the Communications Act of 1934, as amended, to provide in-region, interLATA services in Michigan*, 12 FCC Rcd 20,543 (Aug. 19, 1997), par. 77.

<sup>38</sup> Sprint Comments at par. 3

<sup>39</sup> See Sprint Comments pp. 6-7

